JIM WILKIN TRUCKING

IBLA 96-236 Decided December 17, 1997

Appeal from a decision of the Stateline Resource Area Manager, Bureau of Land Management, Nevada, assessing trespass damages. N-60612.

Affirmed.

1. Materials Act--Trespass: Generally

Where a purchaser of materials under a materials sale contract removed more material than authorized by contract after the expiration date of that contract, an act of trespass has occurred, and the purchaser is liable for damages to the United States. Where the purchaser has not challenged BLM's computation of the volume removed in excess of the authorized amount, and where BLM's assessment of damages is based on a contract provision defining willful trespass and supported by a minerals appraisal report, BLM's decision is properly affirmed.

APPEARANCES: Jim Wilkin, pro se.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Jim Wilkin Trucking (Wilkin) has appealed and petitioned for a stay of a February 6, 1996, Decision of the Stateline Resource Area Manager, Bureau of Land Management (BLM), Nevada, issuing a notice of trespass and assessing $26,580 in damages for a minerals materials trespass in the North Jean Lake Community Pit (NJLC Pit), Clark County, Nevada.

On October 3, 1995, Wilkin and BLM entered into a contract (No. 960000003) authorizing the removal of 3,000 cubic yards (cy) of materials at a price of $2,610 from the NJLC Pit. The contract, effective as of October 3, 1995, expired on November 2, 1995.

On January 29, 1996, BLM official Manuel Palma inspected the NJLC Pit. He found Lorin Wilkin, Jim Wilkin's son, operating at the site. Palma admonished Lorin Wilkin that he was to haul no material without a contract. According to Palma's memorandum of the meeting, Lorin Wilkin told Palma that Wilkin had been hauling material since January 1, 1996.

According to a BLM memorandum to the file (dated February 12, 1996), Jim Wilkin came into BLM's Las Vegas District Office on February 2, 1996, and told BLM Land Law Examiner Susan Hepworth that he had removed no material while the contract was in effect, but had removed 6,645 cy after the contract had expired. Mr. Wilkin said that he wanted to pay for what he had removed but became angry and left the office after Hepworth advised "that we considered him to be in trespass and therefore the cost of the material would be more."

According to the Decision appealed from, BLM determined that 6,645 cy had been removed in trespass. The BLM assessed $4 per cy, for "Type II" material, for a total of $26,580 in damages. The assessment was based on a January 21, 1993, mineral (appraisal) report which lists the measure of damages for willful mineral trespass. For Type II material from the NJLC Pit, the value listed is $4 per cy.

The Board has before it only Wilkin's Petition for Stay. No statement of reasons for appeal has been filed. See 43 C.F.R. § 4.412. The stay regulation, 43 C.F.R. § 4.21 (a)(3) and (b)(4), provides that

> [a] decision, or that portion of a decision, for which a stay is not granted will become effective immediately after the Director or an Appeals Board denies, or partially denies the petition, or fails to act on the petition within * * * 45 calendar days of the expiration of the time for filing a notice of appeal.

Since the regulatory period expired without action on the Petition for Stay, the Decision appealed from became effective. Since no statement of reasons for appeal was filed, we will consider the arguments in Wilkin's Petition for Stay in adjudicating the merits of the appeal. Wilkin asserts that "due to circumstances beyond the control of Jim Wilkin Trucking, some removal occurred later in time than expected and additional materials were removed." Wilkin does not dispute the volume removed in trespass. Jim Wilkin suggests that the amount assessed, "approximately ten (10) times the original contract price," is excessive. Wilkin contends further that it is not a trespasser and that "equity and law * * * demand that the fine be eliminated (or at the least reduced to a reasonable level)." Further, Wilkin argues that it will incur a loss of capital and that the public interest warrants some relief.

[1] The regulation at 43 C.F.R. § 3603.1 defines unauthorized use as the extraction, severance, or removal of mineral materials from public lands under the jurisdiction of the Department of the Interior, unless authorized by sale or permit under law and Departmental regulations, and provides that unauthorized users are liable for damages to the United States. Under 43 C.F.R. § 9239.0-7, such unauthorized removal of mineral material from public land constitutes an act of trespass for which the trespasser is liable in damages to the United States. Bolling Construction Co., 125 IBLA 303, 306 (1993).

In this case an unauthorized use (trespass) occurred when Wilkin removed more material than authorized by the contract after the contract had expired. That trespass was willful, as defined in General Stipulation No. 5, incorporated into Wilkin's contract:

> If Purchaser * * * extracts any mineral materials * * * after expiration of the time for extraction * * *, such extraction or removal shall be considered both a willful trespass and a criminal trespass. The willful trespass will render Purchaser liable for the actual value of the materials at the time of conversion (sale by Purchaser).

Since Wilkin ignored the time span authorized by its contract and removed material from the NJLC Pit after the contract had expired, under Stipulation No. 5, the trespass was willful and damages are properly assessed. See Bolling Construction Co., supra, at 307.

In CM Concepts of Nevada, 126 IBLA 134, 139 (1993), which also involved the NJLC Pit, BLM used a November 6, 1989, mineral appraisal report as the basis for its trespass damages computation of $4.01 per cy for Type II material. In this case, Wilkin has raised no objection to BLM's use of the 1993 mineral report as the basis for calculating damages, and has submitted no evidence that other values would be more representative. Wilkin's general assertions that the assessment is too steep are of no probative value. Accordingly, we find no error in BLM's valuation of damages at $4 per cy based on the January 21, 1993, mineral report.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R § 4.1, the Decision appealed from is affirmed.

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James P. Terry
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge